No. 42431-2-II

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ALEXIS S. SANTOS,
Appellant,

v.

THE WASHINGTON STATE
OFFICE OF THE INSURANCE COMMISSIONER,
and
THE STATE OF WASHINGTON,
Respondents.

ON APPEAL FROM
THURSTON COUNTY SUPERIOR COURT

APPELLANT'S OPENING BRIEF

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INTRODUCTION

"[A] plaintiff bringing a discrimination case in Washington assumes the role of a private attorney general, vindicating a policy of the highest priority." *Allison v. Housing Auth.*, 118 Wn.2d 79, 86, 821 P.2d 34 (1991) (citation omitted). When the legislature adopted the Washington Law Against Discrimination (WLAD), ch. 49.60 RCW, its aims were sweeping: "to deter and to eradicate discrimination in Washington," *Marquis v. City of Spokane*, 130 Wn.2d 97, 109, 922 P.2d 43 (1996) (citations omitted). The plaintiff in this case is appellant Alexis S. Santos, a Filipino man whose childhood sexual abuse has contributed to mental disability—major depression, anxiety, and impulse-control disorders. Like all Washingtonians, Santos enjoys the right under the WLAD "to obtain and hold employment without discrimination," RCW 49.60.030(1), and here he seeks to vindicate that right and the WLAD's goals.

Santos worked as an actuary for over five years at respondent Office of the Insurance Commissioner (OIC). After the official with appointing authority over him meets him and shows visible disappointment and the sight of him, Santos is soon demoted. Yet his first three job-performance evaluations were positive, using phrases such as "His performance has been exemplary," "Santos has performed exceedingly well in several areas,"

"team player," "efficient, effective, on time," and "he communicates well." (CP 288–89.) Performing the job duties of a higher level, Santos asked repeatedly to have his job reclassified to a higher-level actuary, as was the OIC's practice. But his superiors do nothing for years. Believing he is experiencing racial or national-origin discrimination, Santos suffers mental-health breakdowns that his psychiatrist describes as "severe." (CR 434 ¶ 18, 442.) Santos goes on medical leave twice, first for a month, and then for several months. During the second leave of absence, he files a charge of discrimination with the Equal Employment Opportunity Office (EEOC). The OIC, leveraged into an EEOC mediation, agrees to reclassify Santos's job position but does not implement this step for four months.

Santos and his psychiatrist informed the OIC that he could return to work but would need a reasonable accommodation, preferably an internet filter, to deal with the symptoms of his major depression and anxiety. The OIC never spoke with Santos's psychiatrist or asked for his medical records, though Santos had authorized the OIC to do those very things. When Santos returned from leave full time, the OIC fired him after he had been back for only ten days. The OIC did not install an internet filter on Santos's laptop; instead, the OIC turned off its local-network internet filter, monitored Santos's internet use, and then confiscated his laptop. San-

tos filed a second complaint with the EEOC, this time for disability discrimination and failure to reasonably accommodate a disability. The next day after receiving a copy, the OIC sent a letter to Santos outlining allegations of his violations of the OIC's internet-use policies. The OIC then terminated him. Other OIC employees accused of violating these policies in a similar fashion had been only fined $450 to $900, not fired.

The OIC, upon knowing or having reason to know about Santos's qualifying mental disability, had a continuing affirmative duty to inquire into the nature and extent of Santos's mental disability and to engage in a good-faith process of trial and error to reasonable accommodate his impairment. Once this duty attached, the WLAD prohibited the OIC from firing him for the conduct arising from his disability. The WLAD also restricted the OIC from using Santos's conduct as a justification for discharging him when, in fact, a substantial factor motiving the OIC was his disability, his race or national origin, and his protected activity under the WLAD.

A jury, not a court, should decide whether the OIC committed discrimination, retaliatory discharge, and negligent infliction of emotional distress. Because "[s]ummary judgment should rarely be granted in employment discrimination cases," *Sangster v. Albertson's, Inc.*, 99 Wn. App. 156, 160, 991 P.2d 674 (2000), the superior court's grant of summary judgment

to the OIC should be reversed.

ASSIGNMENTS OF ERROR

1. The trial court erred in granting, by its order dated May 6, 2011, summary judgment to the OIC on Santos's claims for disability discrimination under the Washington Law Against Discrimination (WLAD), Ch. 49.60 RCW (First Cause of Action in First Amended Complaint).

2. The trial court erred in granting, by its order dated May 6, 2011, summary judgment to the OIC on Santos's claim for racial discrimination under the WLAD (Second Cause of Action in First Amended Complaint).

3. The trial court erred in granting, by its order dated July 15, 2011, summary judgment to the OIC on Santos's claim for retaliation under RCW 49.60.210 (Third Cause of Action in First Amended Complaint).

4. The trial court erred in granting, by its order dated May 6, 2011, summary judgment to the OIC on Santos's claim for negligent infliction of emotional distress (Fifth Cause of Action in First Amended Complaint).

5. The trial court erred in denying, by its order dated April 1, 2011, Santos's motion in limine and to strike.

ISSUES

I. Whether a genuine issue of material of fact remains for trial on Santos's claims for disability discrimination under the WLAD. (Assignment of

Error No. 1)

II. Whether evidence of an employer belittling an employee, failing to promote a qualified employee, and levying comparably harsher punishment than for other employees, allows a reasonable juror to infer race or national origin was a substantial factor in an employer's termination decision, thus justifying a trial on a claim for racial discrimination under the WLAD. (Assignment of Error No. 2)

III. Whether a genuine issue of material fact exists on a retaliation claim where the adverse employment action comes after a history of the employee's protected activity and just days after filing an EEOC complaint, the employee had previously performed the job satisfactorily, and other employees had not been punished as harshly for similar misconduct. (Assignment of Error No. 3)

IV. Whether there is a genuine issue of material fact regarding OIC's negligent infliction of emotional distress. (Assignment of Error No. 4)

V. Whether it is irrelevant or unfairly prejudicial to consider the content of an employee's personal computer usage where the employer policy disallowing such usage is based on duration and frequency, not content. (Assignment of Error No. 5)

STATEMENT OF THE CASE

I. FACTUAL HISTORY

Alexis S. Santos, a man born in the Philippines and of Filipino descent, was sexually abused as a child. (CP 121, 432 ¶ 7, 493 ¶ 6.) Despite his early-life trauma, Santos develops professional kills as an actuary, and in 2001 he applies for a job as an actuary associate with the Washington State Office of the Insurance Commissioner (OIC). One of Santos's interviewers remarks that Santos "was personable, well-spoken, was enthusiastic" during the interview process, and that Santos has the skills and industry experience as a life actuary that the OIC seeks. (CP 334:18–335:7.) Santos is hired. (CP 100.) On the day Santos begins his new job, June 1, 2001 (CP 340 ¶ 3), he still bears deep emotional scars from his childhood abuse (CP 432 ¶ 7, 493 ¶ 6). But Santos is not pursuing mental-health treatment.

Upon starting at the OIC, Santos enjoys a position of influence within the OIC, reporting directly to Deputy Commissioner Jim Odiorne, who in turn reports directly to Michael Watson, the Chief Deputy Commissioner. (CP 65 ¶ 1, 280, 341 ¶ 8.) Santos occupies the same line of authority as the Chief Financial Analyst, two assistant deputy commissioners, the Chief Financial Analyst, the Chief Examiner for Market Conduct, and Pat McNaughton, a chief financial examiner. (CP 280.) These colleagues are,

in Santos's words, his "contemporaries or equals." (CP 341 ¶ 8.) Santos's responsibilities include conducting actuarial analysis to confirm life insurers' reported reserves and ensure they are sufficient; supporting the team of the Chief Financial Analyst by performing complex actuarial analysis; and providing actuarial analysis in support of the agency's rehabilitation and liquidation proceedings. (CP 339–40 ¶ 2.)

Santos attends an orientation for new OIC employees. (CP 340 ¶ 4.) There he sees Watson, the appointing authority who approved hiring Santos, but whom Santos has never met. (CP 66 ¶ 1, 340 ¶¶ 4–5.) Santos meets Watson, who, upon setting eyes on Santos, appears "disappointed and upset to see me," Santos explains. (CP 340 ¶ 5.) Watson calls Santos a "trouble maker," a comment that embarrasses Santos. (CP 340 ¶¶ 5–6.) Because this scene unfolds in front of other newly hired employees, Santos feels only a heightened sense of "embarrassment and insecurity." (CP 340 ¶ 6.) In September 2001, Santos begins seeing a psychiatrist, Dr. Alan Javel, who diagnoses Santos as having major depressive disorder and impulse-control disorder. (CP 350 ¶ 43, 430–31 ¶¶ 1–3, 458.)

That same month, Watson again dresses down Santos, only this time through Watson's inferior. (CP 341 ¶ 7.) Santos wrote a report to the OIC's chief actuary, addressing both sides of the argument on a proposed

ban on credit scoring in underwriting insurance risks. (CP 341 ¶ 7.) After learning of the report, Watson emails Santos's supervisor, Deputy Commissioner Odiorne. (CP 367.) Odiorne then hauls Santos into his office and scolds him for "going against the grain" and "upsetting" Watson, even though the chief actuary had asked Santos for the report. (CP 341 ¶ 7.) In the aftermath, Santos again feels "singled out and targeted by Mr. Watson." (CP 341 ¶7.)

Two or three months later, without anyone consulting with him, Santos's position is lowered. (CP 282, 342 ¶ 9.) McNaughton, the chief financial examiner whom Santos formerly counted as an equal, now directly supervises Santos. (CP 282, 342 ¶ 9.) No one else at the OIC is similarly demoted, and no one ever explains the change to Santos. (CP 342 ¶ 9.)

Yet in Santos's first job-performance evaluation, completed in September 2002, it states, "Mr. Santos has performed exceedingly well in several areas," and, "His performance has been exemplary" during the examinations of five life-insurance companies. (CP 288–89.) The evaluation describes his work as "efficient, effective, on time," calls him "a team player," and says "he communicates well." (CP 288.)

Having worked at the OIC for a year, Santos performs basically the same duties as the job category "Actuary—Insurance Policy and Rate

Regulation," a higher position. (CP 342 ¶ 10.) McNaughton admits as much. (CP 277 ¶ 4, 290–92.) And Santos believes that, under applicable policy or practice, his enhanced job duties entitle him to the higher position. (CP 342 ¶¶ 11–12). Santos speaks several times with McNaughton and Odiorne, the deputy commissioner, about reclassifying his job position upward. (CP 342 ¶ 10.) Nothing becomes of these efforts as of September 2002, when the OIC promotes a different actuary associate to the higher job classification that Santos seeks. (CP 342 ¶ 13.) At that time, Santos has been performing the same job duties as the other actuary associate. (CP 342 ¶ 13.)

Santos then asks McNaughton again about being reclassified to the higher position. (CP 343 ¶ 14.) McNaughton hands him off to the OIC's chief actuary, who in turn reassures Santos that it should be a "simple process" and "not take too long" to promote Santos. (CP 343 ¶ 14, 369.) McNaughton speaks with the OIC's HR manager about reclassifying Santos, but nothing happens, and no one suggests to Santos that he has failed to take any step necessary to obtain the reclassification. (CP 100, 343–44 ¶ 14, 369.)

A few months later, Santos asks for permission to attend a continuing education course in Orlando, Florida sponsored by the Society of Actuar-

ies. (CP 345 ¶ 20.) McNaughton and Odiorne grant permission. (CP 345 ¶ 20, 373.) But Watson overrules them, claiming he wants Santos to attend a course offered at a closer location. (CP 345 ¶ 20, 376.) Santos learns later, however, that a white actuary associate receives permission to attend a continuing education course in Orlando. (CP 345 ¶ 21.)

McNaughton writes a performance evaluation of Santos's work from August 2002 to July 2003. (CP 286–87.) The evaluation betrays no dissatisfaction with Santos or his work. (CP 286–87.) It describes Santos's "excellent ability to multi-task in carrying out his responsibilities" and a "timely and efficient" work ethic. (CP 286.) It notes Santos's developing skills in actuarial assessment and describes him as an active team member. (CP 286.) It says that Santos "has effectively and efficiently responded to all communications in a timely manner." (CP 286.) About Santos's "customer service" skills, the evaluation states that Santos "always considers agency and company management attitudes and concerns." (CP 286.) The evaluation sets a goal for Santos continuing education on actuarial principles and methods, including attendance at Society of Actuaries meetings (CP 287)—the very thing Santos sought to do in Orlando.

Despite this positive evaluation, Santos's job is not reclassified to the higher position. (CP 345 ¶ 19.) Santos continues asking McNaughton what

he can do, and he sends McNaughton an email on September 8, 2003 to ask if McNaughton has spoken with the chief actuary about the promotion. (CP 343 ¶¶ 15–16, 371.) After nothing happens, Santos asks McNaughton why the promotion has not come. McNaughton tells him he "had to be white." (CP 344 ¶ 17.)

Confronted with this comment he perceives to be racially discriminatory, Santos becomes, in his words, "extremely upset" and "frightened." (CP 344 ¶¶ 17–18.) Unsure of what to do and convinced he will never be promoted, Santos fears that McNaughton or Watson will retaliate against him if he reports his suspicions of discrimination. (CP 344–45 ¶¶ 17–18.)

Santos's mental health deteriorates. He confides to Dr. Javel, his psychiatrist, that he believes the OIC discriminates against him because of his race. (CP 433–34 ¶ 14.) Dr. Javel notes that Santos, as a result, experiences "feelings of worthlessness, lack of self-confidence, lack of motivation, inability to concentrate, problems with distraction, anxiety, panic attacks, suicidal thoughts and tendencies, depression, and significant emotional, mental, and physical pain." (CP 434 ¶ 16.) Dr. Javel finds that Santos's depression and impulse-control disorder cause "anxiety and depressive swings," and a "compulsion to view internet content in a mindless and involuntary fashion," as Santos distracts himself from specific projects by

going online. (CP 431-32 ¶¶ 5-6.) Santos asks McNaughton on February 10, 2004 for internet-filter software to be installed on his work laptop, because the filter software on the OIC's local access network does not work unless Santos is plugged in locally. (CP 346 ¶ 22, 378.) The IT staff submits a request for approval to install the filter. But Watson denies Santos's request. (CP 346-47 ¶¶ 24-26, 380-84.) Three days later, Dr. Javel concludes Santos's condition has become "severe" and writes a letter recommending a month-long leave of absence for Santos. (CR 434 ¶ 18, 442.) Santos goes on leave. (CP 350 ¶ 36.)

Santos's job performance remains good when he returns. For the period from August 2003 through September 2004, a performance evaluation report states, "Santos has efficiently managed his time during the past twelve months." (CP 284.) Further, "Santos has continued to provide leadership," notes the evaluation, "in the use of software for sampling and for his continued study." (CP 284.) The evaluation also applauds Santos's creativity and commitment to helping the OIC, noting, "Santos has consistently continued to seek opportunities to improve our work processes." (CP 284.) Indeed, Santos has created a work process whereby all of the agency's actuaries were coordinated and its actuarial information analyzed before initiating a company examination. (CP 284.) The evaluation de-

scribes Santos as "very instrumental in conveying examination actuarial concepts and issues to examiners and company management." (CP 284.) It says Santos taught a "well received" class on life actuarial principles to the examination team, and it lauds Santos for expanding his skills to assist the OIC with examinations of health-insurance companies, not just life insurers. (CP 284.) Nothing bad is mentioned. (CP 284–85.)

Santos continues performing job duties beyond his position as an actuary associate. (CP 369 ¶ 6.) Even so, and despite his positive job-performance evaluations, the OIC does not reclassify Santos to the higher job position. (CP 345 ¶ 19.) Santos receives an invitation from the National Association of Insurance Commissioners to speak at its annual convention, "a prestigious honor," of which Santos is "very proud." (CP 347 ¶ 29.) Many actuaries and deputy insurance commissioners do not receive an invitation to attend, let alone to speak. (CP 347–48 ¶ 29.) But no one at the OIC recognizes Santos for this professional milestone—not McNaughton, not Odiorne, not Watson. (CP 348 ¶¶ 30–31.) Instead of announcing it, as Santos asks, the OIC newsletter trumpets trivial news, such as the birthday of an OIC colleague's pet. (CP 348 ¶ 30.)

Santos becomes fed up, now that days, months, and years have gone by without a job reclassification since he began outperforming his job position

and receiving positive evaluations. Feeling despair at the discrimination he perceives, he suffers mental-health symptoms that, according to Dr. Javel, grow "progressively worse." (CP 434 ¶ 16.) Santos goes back to Dr. Javel for treatment on August 1, 2005, and he files a complaint of racial and national-origin discrimination with the EEOC and the Washington State Human Rights Commission on August 12, 2005. (CP 351 ¶ 38, 396, 458.)

A few days later, on Dr. Javel's instructions, Santos obtains permission to take a medical leave of absence. (CP 350–51 ¶ 37, 392–94, 435 ¶¶ 20–22.) In addition to depression, anxiety, and impulse-control problems, Santos suffers hypertension and psoriasis, a skin condition where red splotches appear all over the body, as a result of stress. (CP 349 ¶ 33.) He grinds his teeth so badly that he needs a crown and new fillings. (CP 349 ¶ 33.) He struggles sleeping at night and getting out of bed in the morning, and his self-motivation and feeling of self-worth plummet. (CP 349 ¶ 33.) The man who charmed his job interviewers and garnered plaudits for his communication and his time efficiency becomes a person who feels, in his words, "fearful, guilty, shameful, and afraid when acting with others," and who struggles to stay focused and on-task. (CP 349 ¶ 33.) Santos remembers "many days where I simply could not function as a normal human being." (CP 349 ¶ 33.)

Over the next two months, Dr. Javel sends documents informing the OIC that Santos is experiencing "significant symptoms" disabling him from working. Dr. Javel tells the OIC of major depression, hypertension, and panic disorder. (CP 435 ¶¶ 20–22, 444–46.) Dr. Javel treats Santos while he is on leave with therapy and prescription medication. (CP 435 ¶ 20.) Another doctor who reviews Santos's condition, psychiatrist Robert Olsen, M.D., explains that a human being's negative perceptions about a social environment, such as a hostile workplace, may lead to major depression and anxiety. (CP 466–74 ¶¶ 1–14, 480.) The resulting conditions include psychosomatic diseases, social withdrawal, sleep irregularity, and feelings of low self-esteem, defeatism, stress, and fear. (CP 467–74 ¶¶ 5–14.) Dr. Olsen explains that these mental impairments generally, and in Santos's case specifically, are rooted in the complex anatomic functioning of the human brain. (CP 467–74 ¶ 5–17.) By improving the "dopaminergic tone" in the brain, medications such as Wellbutrin alleviate depression and its symptoms. (CP 472–73 ¶ 14.)

As Santos receives medical treatment while on leave, EEOC mediates Santos's discrimination complaint in November 2005. (CP 351 ¶ 39.) The OIC finally agrees to reclassify Santos's position to "Actuary—Insurance Policy and Rate Regulation." (CP 351 ¶ 30.) But the OIC drags its feet.

Santos sends several letters and emails starting in November 15, 2005 regarding the reclassification. (CP 351–52 ¶¶ 39–43, 398-415.) Yet the OIC does not reclassify him right away. Instead, the OIC insists it needs more information from Santos. (CP 351–52 ¶¶ 39–43, 398-415.) During this back-and-forth exchange, Santos's leave of absence continues, and he emails the OIC HR manager on December 2, 2005, writing, "[m]y disability is mental health," and "when I am well enough to go back to work" a discussion about reasonable accommodation would be appropriate. (CP 404.) Finally in March 2006, Watson sends a letter approving his reclassification. (CP 352 ¶ 44.) However, despite agreeing otherwise in the EEOC mediation, the OIC pays Santos the higher salary only as of March 2006, instead of November 2005. (CP 353 ¶ 44.) OIC officials demand he sign an EEOC settlement agreement, but Santos refuses. (CP 354 ¶¶ 45–46.)

Now in April 2006, Santos emails the HR manager and McNaughton with a letter from Dr. Javel authorizing Santos to return to work as of April 17 "with accommodations." (CP 416, 450.) Dr. Javel's letter states, "The best accommodation would be for him to telecommute 4 out of 5 days per week." (CP 450.) Santos faxes a completed OIC form entitled "Employee Reasonable Accommodation and Medical Release Form," writing that he has a "mental disability," naming "major depression, panic attacks, anxie-

ty," and requests an accommodation to "telecommute at least 4 days per week." (CP 418.) Santos signs an authorization for the OIC to confer with Dr. Javel about Santos's disability and to obtain his medical records. (CP 418.) The OIC HR manager then writes a letter to Dr. Javel. (CP 35 ¶ 5, 154–57.) The letter does not inquire about the nature of Santos's medical condition, but rather asks about the effects of his medication and whether he can travel and also work face-to-face with peers in the office. (CP 35 ¶ 5, 154–57.) Dr. Javel responds that a gradual return to the office would be best if Santos must work onsite. (CP 452.) Under these instructions, Santos returns to work part time on May 17, 2006. (CP 36 ¶ 8.)

The next month, Dr. Javel writes a follow-up letter authorizing Santos to work full time as of July 10, 2006, but he cautions, "I recommend that he have an internet filter for his laptop when he is traveling, to minimize distractions and minimize anxiety." (CP 454.) This is the second time that Santos or someone on his behalf has mentioned an internet filter, and this time it is connected expressly to Santos's mental disability. The OIC HR manager calls Dr. Javel in early July to discuss the request for a filter. He is not available, but he follows up and leaves her a voicemail. (CP 37 ¶ 10, 436 ¶ 26.) Thereafter, neither the HR manager, McNaughton, Odiorne, Watson, nor anyone else at the OIC follows up with Dr. Javel about the

internet-filter request or the nature and extent of Santos's mental-health problems.

After Santos returns to work full time, the OIC HR manager meets with Santos on July 14, 2006, and the morning of July 17. (CP 422.) Based on these conversations, she agrees that an internet filter should be installed on Santos's work laptop. (CP 422.) She writes in a confirmation email, "This concludes your request for this filter as a medical accommodation." (CP 422.) Santos recalls, "I did not limit my request to a filter only while traveling." (CP 359 ¶ 59.) He says, "I explained to the OIC that I needed this filter to minimize distractions and lower my anxiety levels," and, "I needed a filter any time I was performing work related tasks because I could get distracted by the internet." (CP 359 ¶ 59.)

Just three days later, the OIC *turns off* the filter that blocks adult-oriented websites when computers are connected to the agency's local access network. (CP 46.) Santos emails IT staff at 2:05pm asking them to install the filter on his work laptop. (CP 244.) No one does. The OIC's filter, now disabled, no longer prevents Santos from accessing adult websites or chatrooms when his laptop is plugged in on the local OIC network. (CP 361 ¶ 68.) He goes online, "clicking the mouse randomly and without purpose." (CP 361 ¶ 68.) Meanwhile, the OIC's IT staff monitors agency in-

ternet traffic, and late that afternoon they notice Santos's laptop accessing a personal email account and adult-oriented websites. (CP 45.) OIC officials confer, and, after Santos goes home, they confiscate his laptop and place him on home leave. (CP 55–56 ¶¶ 5–7.)

Dr. Olsen explains that, besides medication, another method of activating the dopaminergic system is sexual arousal, including by accessing adult material online. (CP 473–74 ¶¶ 15–16.) Consistent with this medical evaluation, Santos remembers viewing adult-oriented websites and accessing chatrooms during his employment at the OIC. (CP 354 ¶ 47.) Dr. Olsen's opinion is that this behavior "served several psychological functions," which included boosting Santos's dopaminergic system and temporarily reversing his feelings of defeat and isolation. (CP 474 ¶ 17.) Steven Williams, a licensed family counselor who treats Santos, also points to Santos's childhood sexual abuse as "play[ing] a significant role in his intrapsychic structure." (CP 494 ¶ 12.) Williams concludes that Santos's online behaviors are a "method of coping with his abuse." (CP 494 ¶ 14.) Dr. Javel similarly concludes that Santos's internet conduct "most likely has a connection to sexual trauma he experienced as a child." (CP 432 ¶ 7.) While his compulsive internet behavior might provide temporary relief from his depression, Dr. Javel and Williams earlier advised Santos it would

be best for his mental health to stop. (CP 355-56 ¶ 50.) Santos followed this advice a couple years earlier, installing an internet filter on his home computer. (CP 356 ¶ 51.) The software, in conjunction with anti-depressants prescribed by Dr. Javel, had successfully ended Santos's adult-oriented activity online (CP 356 ¶ 51, 458)—until he gained access to an unfiltered work computer.

While on home leave, Santos emails the OIC HR manager to remind her that he asked for an internet filter as a reasonable accommodation. The OIC HR responds with a letter simply summarizing her version of events. (CP 168-69.) A few days later, Dr. Javel sends a letter to the OIC, stating that Santos has told him that the internet filter was never installed, and that Santos cannot work until it is. (CP 456.) As Santos remains in limbo on home assignment, he becomes suicidal and is hospitalized for a week. (CP 362 ¶ 70.) On August 7, the OIC hires an analyst to examine Santos's laptop, and he completes his report on August 16. (CP 58-59 ¶¶ 3-6, 68 ¶ 10) No one from the OIC contacts Dr. Javel to discuss what happened.

Santos files a complaint with the EEOC charging the OIC with disability discrimination, retaliation for his prior complaint to the EEOC, and failure to provide a reasonable accommodation. (CP 424.) Watson acknowledges receiving a copy of the EEOC complaint on September 12,

2006. (CP 68 ¶ 10, 196–97.) The very next day, even though Santos has been on home assignment for eight weeks already and Watson has had the computer analyst's report for four weeks, Watson fires off a letter to Santos. (CP 202–09.) Watson warns Santos he might be discharged for violating OIC policy, sets a pre-disciplinary hearing date, and describes Watson's understanding of the forensic computer examination. (CP 202–09.)

Before, McNaughton had never disciplined Santos. (CP 337:8–337:13.) Watson had levied a fine on Santos four years earlier, alleging Santos sent an email on OIC letterhead to his personal homeowner's insurer. (CP 102–06.) But Santos's performance reviews were positive and did not indicate any other discipline. (CP 284–89.)

A union representative attends the pre-disciplinary hearing on Santos's behalf and re-iterates to Watson that Santos asked for a filter as a reasonable accommodation of a medical problem. (CP 69 ¶ 15, 277 ¶ 6, 298–300, 364 ¶ 76.) Two days later, OIC officials re-review emails from February 2004 regarding Santos's earlier request for an internet filter. (CP 378–82.) No one from the OIC contacts Dr. Javel or Santos regarding his medical condition. (CP 364 ¶ 76.)

Watson terminates Santos by letter on October 3, 2006, citing OIC policies that prohibit the personal use of state resources. (CP 211–29.)

But the OIC had not previously fired anyone for personal internet use. (CP 318-29.) Indeed, other employees disciplined under the sample policies as Santos had received lighter treatment. For example, Watson fined the Chief Financial Analyst just $500 when "a significant amount of [his] Internet activity appeared to be of personal nature rather than business related." (CP 280, 328.) In another case, an OIC employee made personal long-distance phone calls, wrote personal emails, sent "thousands of non-business instant messages" within just a few months, and visited non-business websites "hundreds of times" over six months. (CP 326.) Before being formally disciplined, this employee was first counseled on inappropriate internet use and then met with a manger regarding declining productivity and personal phone calls. (CP 326.) Watson fined her only $900. In a third case, an OIC employee sent personal email and "thousands of non-business related instant message," but Watson fined him just $450. (CP 324.)

II. PROCEDURAL HISTORY

Santos files suit in Thurston County Superior Court. His claims include failure to reasonably accommodate a disability, disparate treatment on the basis of disability, racial and national-origin discrimination, retaliation, and negligent infliction of emotional distress. (CP 7-20, 624-38.)

The court grants the OIC's motions for summary judgment on all claims. (CP 656–58, 713–14.) Santos appeals. (CP 715–24.)

ARGUMENT

I. THESE DISABILITY-DISCRIMINATION CLAIMS SHOULD BE DECIDED BY A JURY, NOT A COURT

Employers may not "discharge or bar any person from employment" or "discriminate against any person in compensation or in other terms or conditions of employment because of ... the presence of any sensory, mental, or physical disability." RCW 49.60.180(2)–(3). This prohibition creates two relevant causes of action. The first is a claim that the employer failed to reasonably accommodate the employee's disability. *E.g.*, *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 145, 94 P.3d 930 (2004). The second is a claim of disparate treatment—the employer treated the employee differently "because of the employee's condition." *Id.* (citation omitted).

Santos brought both of these claims. Because genuine issues of material fact remained for a jury to resolve at trial, the superior court was wrong to decide Santos's claims as a matter of law. Therefore, its summary judgment in favor of the OIC on these claims should be reversed and the case remanded for trial. The standard for reviewing the court's summary judgment below is "the usual standard of review on summary judgment." *Johnson v. Chevron U.S.A., Inc.*, 159 Wn. App. 18, 27, 244 P.3d 438 (2010).

A. The un-rebutted evidence of Santos's mental disorders would allow a reasonable jury to conclude that Santos suffered a "disability" within the meaning of the WLAD

The threshold issue for claims of failure to accommodate and of disparate treatment is whether the employee suffers from "disability." RCW 49.60.180(2)-(3). The term "disability" is defined as any "impairment," be it "sensory, mental, or physical," that "[i]s medically cognizable or diagnosable," "[e]xists as a record or history," or "[i]s perceived to exist whether or not it exists in fact." RCW 49.60.040(7)(a). Crucially, "[a] disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity within the scope of [the WLAD]." RCW 49.60.040(7)(b). Whether an employee's condition meets the statutory definition of "disability" is a question for the jury. *See* 6A Washington Practice: Washington Patter Jury Instructions—Civil WPI 330.31 (5th ed. & Supp. 2011).

Here, ample evidence in the record would permit a reasonable juror to conclude that Santos suffered from a mental disability. The medical doctor who treated Santos, Dr. Javel, says he diagnosed Santos as having major depressive disorder and impulse-control disorder from 2001 through 2008. (CP 431 ¶¶ 3-5.) That should be the end of the matter, as Santos's condi-

tion has been "medically ... diagnos[ed]." RCW 49.60.040(7)(a). And it is well settled that a jury may find depression and other psychiatric disorders, such as post-traumatic stress disorder, are mental impairments protected under the WLAD. *See* RCW 49.60.040(7)(c)(ii) (defining "impairment as including "[a]ny mental, developmental, traumatic, or psychological disorder); *Riehl*, 152 Wn.2d at 152–53 (describing the employee's depression and PTSD as "disabilities"). Of course, it is ultimately not a question of law. *See Phillips v. City of Seattle*, 111 Wn.2d 903, 910, 766 P.2d 1099 (1989) ("[T]he issue of whether a person is handicapped under RCW Ch. 49.60 is a question of fact for the jury."). Therefore, there is a genuine issue of material fact whether Santos had a disability.[1]

B. A reasonable jury could find the OIC knew or had reason to know that Santos suffered from a qualifying mental disability, and the OIC had an affirmative duty to accommodate it with an internet filter and other measures

Under the WLAD, every employer has a duty to "affirmatively take

[1]The statutory definition of "disability" was adopted in April 2007. Laws of 2007, ch. 317 § 2. The enacting bill states, "This act is remedial and retroactive, and applies to all causes of action occurring before July 6, 2006, and to all causes of action occurring on or after the effective date of this act." *Id.* § 3. Because Santos's disability, and the OIC's knowledge of it, arose before July 6, 2006, the statutory definition applies. Even if it did not, whether Santos's condition constituted a disability would still be a triable issue of fact. In *McClarty v. Totem Elec.*, 157 Wn.2d 214, 137 P.3d 844 (2006), which announced the definition of disability applicable between July 6, 2006 and the effect date of the new statutory definition, the Court interpreted "impairment" to mean a condition substantially limiting a major life activity such as sleeping, concentrating, and thinking. *Id.* at 229. Declarations from Santos, Dr. Javel, Dr. Olsen, and Mr. Williams established that his mental disorders caused, among other things, serious sleep irregularity and problems concentrating.

steps to help the disabled employee continue working at the existing position." *Griffith v. Boise Cascade, Inc.*, 111 Wn. App. 436, 442, 45 P.3d 589 (2002) (citations omitted). This affirmative duty of accommodation arises when the employee notifies the employer that he has a disability. Of course, the employee does not have to inform the employer of "the full nature and extent of the disability." *Goodman v. Boeing Co.*, 127 Wn.2d 401, 408, 899 P.2d 1265 (1995) (citation omitted). Rather, it is enough for the employer to know or have reason to know that the employee suffers from a disability. *See Martini v. Boeing Co.*, 88 Wn. App. 442, 458, 945 P.2d 248 (1997).

Once the duty thus arises, it is the *employer* who must "ascertain the nature and extent of [the employee's] disability." *Goodman*, 127 Wn.2d at 408 (upholding a jury instruction so stating). Although the employee "retains a duty to cooperate with the employer's efforts by explaining her disability and qualifications," *id.*, it is not proper for the employer to "leave the initiative to [the employee]," *Dean v. Municipality of Metropolitan Seattle-Metro*, 104 Wn.2d 627, 639, 708 P.2d 393 (1985). The ideal is an interactive process, "an exchange between employer and employee where each seeks and shares information." *Goodman*, 127 Wn.2d at 408; *accord Frisino v. Seattle Sch. Dist. No. 1,* 160 Wn. App. 765, 779, 249 P.3d 1044 (2011).

After properly ascertaining the nature and extent of the disability, the employer must then provide the "reasonable accommodation," which means "those steps reasonably necessary to enable the employee to perform his or her job." *Snyder v. Med. Serv. Corp. of E. Wash.*, 98 Wn. App. 315, 326, 988 P.2d 1023 (1999). Such steps are "limited to removing sensory, mental or physical impediments to the employee's ability to perform his or her job." *Doe v. Boeing Co.*, 121 Wn.2d 8, 21, 846 P.2d 531 (1993). Although an employer does not have to adopt a specific measure requested by the employee, the employer must implement at least some reasonable accommodation. *Snyder*, 98 Wn. App. at 326. An "undue hardship" is a defense to this duty. *E.g., Snyder*, 98 Wn. App. at 326.

To be sure, not every person with a disability must be accommodated. Under the WLAD, the person's impairment qualifies for a reasonable accommodation if the impairment has "a substantially limiting effect upon the individual's ability to perform his or her job," RCW 49.60.040(7)(d)(i), or the employer has notice and "medical documentation ... establish[es] a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect," RCW 49.60.040(7)(d)(ii). Further, the person must be qualified to "perform the

essential functions of the job, *with or without* reasonable accommodation." *Easley v. Sea-Land Serv., Inc.*, 99 Wn. App. 459, 468, 994 P.2d 271 (2000) (emphasis added).[2]

The failure to reasonably accommodate is a question of fact for the jury to decide. *See, e.g.*, *Martini*, 88 Wn. App. at 458 ("[The employer's] knowledge of the disability thus was a jury question."); *Johnson*, 159 Wn. App. at 31 ("Whether an employer has made a reasonable accommodation is generally a question of fact for the jury."). Importantly, the employee does not have to show that the employer acted with a discriminatory motive; all that matters is whether the employer had the duty and discharged the duty. *See Parsons v. St. Joseph's Hosp. & Health Care Ctr.*, 70 Wn. App. 804, 807, 856 P.2d 702 (1993) (distinguishing thusly between failure-to-accommodate and disparate-treatment claims).

The record shows a genuine issue of material fact whether the OIC complied with its affirmative duty to Santos. OIC knew or should have known about Santos's disability. Santos took leave for a month in February 2004, and Dr. Javel's letter said Santos had "physical and psychological

[2]The OIC's policies say the same thing: "Qualified Individual with a Disability — An individual with a disability who meets the skill, experience, education, and other job related requirements of the position held or desired, and who, with *or without* reasonable accommodation, can perform the essential functions of the job." (CP 305 (emphasis added).)

symptoms." (CP 442.) After Santos went on leave in August 2005, Dr. Javel explained to the OIC that Santos had "significant symptoms" and had been diagnosed with major depression, hypertension, and panic disorder. (CP 435 ¶¶ 20–22, 444–46.) On the eve of Santos's return to work in April 2006, he faxed a form to the OIC indicating a "mental disability," including "major depression, panic attacks, anxiety." (CP 418.) Both Santos and Dr. Javel mentioned the need for a reasonable accommodation. (CP 418, 450.)

A reasonable jury could find also that the OIC did not discharge its duty. Instead of inquiring into the nature and extent of Santos's disability, the OIC, through the HR manager, sent a single letter to Dr. Javel posing just three questions about Santos's medication, his ability to travel, and his capacity for interacting with peers. (CP 35 ¶ 5, 154–57.) On June 30, 2006, Dr. Javel wrote to the OIC to say Santos should have an internet filter installed to accommodate his impairment. (CP 454.) On July 7, the HR manager traded voicemails with Dr. Javel, but she stopped trying after that. (CP 37 ¶ 10, 436 ¶ 26.) Nothing suggests that Santos did not cooperate. In fact, he met with the OIC HR manager twice after he returned to work full time, and he told her he needed an internet filter to eliminate his concentration problems and lower his anxiety levels. (CP 359 ¶ 59.) Although

Santos gave the OIC written authorization to speak with Dr. Javel and obtain Santos's medical records, no one from the OIC ever did.

Not only did the OIC fail to adequately participate in an interactive process, but also there is a genuine factual issue whether the OIC failed to take the reasonably necessary steps to accommodate Santos's impairment. Most obviously, the OIC did not install the internet filter. In fact, it did the opposite, disabling the internet filter on the local network that provided some level of protection. After the OIC did so, the OIC HR manager ignored the pleas of Santos and Dr. Javel that the OIC should have installed an internet filter for Santos. At the pre-disciplinary hearing, Santos's union representative reminded Watson about the need for a reasonable accommodation. Instead of rolling back the process and returning Santos to work with the internet filter installed, Watson fired him. He wrote in the termination letter that it was "ludicrous" to think that the OIC "had a duty to protect you from yourself." (CP 214.) This letter shows how a jury could find the OIC misapprehended its duty.

"[T]he duty to accommodate is continuing." *Frisino*, 160 Wn. App. at 781. Once this affirmative duty attaches, the employer carries it until it can show that accommodation would pose an "undue hardship" or, even with the possible reasonable accommodations, the employee is not qualified to

perform the essential functions of the jobs available with the employer. *Id.* at 777–78. The interactive process requires a "good faith exchange of information" and "trial and error." *Id.* at 780, 782. But the OIC did not remain engaged in the back-and-forth, trial-and-error interactive process. Instead, the OIC turned off its network's internet filter, monitored Santos's use, and then fired him for it. This is not what the OIC's ongoing duty required. The WLAD does not allow employers to put their heads in the sand. Nor does it allow them to intentionally act in bad faith. A jury should decide Santos's claim of failure to reasonably accommodate.

C. A genuine issue of material fact remained for trial on Santos's disparate-treatment discrimination claim because a jury could infer that Santos's mental disability was a substantial factor

Under the WLAD, an employer may not "discharge" an employee "because of ... disability," but this prohibition does not apply if the "disability prevents the proper performance of the particular worker involved." RCW 49.60.180(2). By the statute's terms, a disparate-treatment claim for wrongful discharge contains four elements: (1) disability, (2) capable of performing the job's essential functions, with or without accommodation, (3) discharge, and (4) a causal connection between the discharge and the disability. *See Riehl*, 152 Wn.2d at 149; 6A Washington Practice: Washington Pattern Jury Instructions—Civil WPI 330.32. The first two elements

are the same as those found in failure-to-accommodate cases. *See Riehl*, 152 Wn.2d at 149. The third element is obvious.

The test for causation under RCW 49.60.180(2) is whether the employee's disability was "a 'substantial factor' in an employer's adverse employment decision." *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 310, 898 P.2d 284 (1995). Because a discrimination case is "a multiple causation case," namely a situation where the employer might have both discriminatory and non-discriminatory motives for firing an employee, the "substantial factor" test is appropriate. *Id.* "'This test states that a defendant is liable for plaintiff's injury if the defendant's conduct was a substantial factor in bringing about the injury even though other causes may have contributed to it.'" *Id.* (quoting *Allison*, 118 Wn.2d at 94). The test does *not* require an employee to show that disability was the "determining factor" for the discharge. *Id.* at 310, 312. This lower standard for causation stems from the judicial recognition that "Washington's disdain for discrimination would be reduced to mere rhetoric" if a more exacting standard were required. *Id.* at 310.

On a defense motion for summary judgment, then, the employee need show only that "a reasonable finder of fact could find that the employee's disability was a substantial factor motivating the employer's adverse ac-

tions." *Becker v. Cashman*, 128 Wn. App. 79, 85, 114 P.3d 1210 (2005) (citing *Riehl*, 152 Wn.2d at 149). In discussing this burden, the Washington Supreme Court has emphasized that it is a "burden of *production*, not persuasion." *Riehl*, 152 Wn.2d at 149 (emphasis added). And the employee may meet it either "through direct or circumstantial evidence." *Id.* (citation omitted).

When proceeding solely with circumstantial evidence, an employee may invoke the benefits of the frequently cited burden-shifting framework. All the employee needs to do is produce prima-facie evidence that the employee (1) is disabled, (2) capable of performing the job, (3) was fired and not rehired, and (4) was replaced with a non-disabled person. *E.g.*, *Riehl*, 152 Wn.2d at 150; *Becker*, 128 Wn. App. at 85. If the employer does not produce evidence of a non-discriminatory reason for the discharge, then discharge is presumed discriminatory and the employee is entitled to judgment as a matter of law. *E.g.*, *Riehl*, 152 Wn.2d at 150; *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 181, 23 P.3d 440 (2001). If the employer does produce such evidence, the presumption disappears, and the employee may try the case to the jury if the employee produces sufficient evidence to show that the employer's proffered reason is a pretext for discriminatory intent. *E.g.*, *Riehl*, 152 Wn.2d at 150. "The burdens at all three interme-

diate stages are burdens of production, not of persuasion." *Barker v. Advanced Silicon Materials, LLC*, 131 Wn. App. 616, 624, 128 P.3d 633 (2006) (citation omitted). "On a motion for summary judgment," a reviewing court "considers whether there is sufficient evidence to create a genuine dispute at each stage." *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 661 (6th Cir. 2000).

Importantly, the "pretext" analysis does not graft a new element onto RCW 49.60.180(2) for the employee to prove, nor does it displace the "substantial factor" causation standard from *Mackay*. Instead, the three-stage framework is applied "flexibly to address the facts in different cases," *Johnson v. Dep't of Soc. & Health Servs.*, 80 Wn. App. 212, 227 n.1, 907 P.2d 1223 (1996) (citation omitted), bearing in mind that it is "designed to assure that the plaintiff has his or her day in court despite the unavailability of direct evidence," *Hill*, 144 Wn.2d at 180 (internal quotation, brackets, and citation omitted). Indeed, the burden-shifting framework "need not be used, if it makes the analysis needlessly complex, or if the plaintiff chooses some other method to meet the burden of producing evidence that would allow the factfinder to find unlawful discrimination by a preponderance of the evidence." *Johnson*, 80 Wn. App. at 227 n. 21 (citation omitted). Therefore, if the pretext analysis is unhelpful in a given

case, then "to survive summary judgment [the employee] need show only a reasonable judge or jury could find his disability was a substantial motivating factor for the employer's adverse actions." *Hines v. Todd Pac. Shipyards Corp.*, 127 Wn. App. 356, 370-71, 112 P.3d 522 (2005); *accord Frisino*, 160 Wn. App. at 785.

Under these standards, several independent and sufficient evidentiary grounds would allow a jury to return a verdict for Santos on this claim. First, Watson unquestionably terminated Santos for conduct that was a symptom of his mental disability. Dr. Javel's unrebutted opinion is that Santos's "compulsion to view internet content in a mindless and involuntary fashion" is "[o]ne of the most pronounced symptoms of Mr. Santos's medical conditions." (CP 431 ¶ 6.) Additionally, Dr. Javel, Dr. Olsen, and Mr. Williams all gave professional opinions attributing Santos's internet use to his depression and anxiety, and they concluded the adult dimension is connected to lingering emotional trauma from Santos's childhood sexual abuse. Under the WLAD, "[c]onduct resulting from the disability (e.g., decrease in performance) is part of the disability and not a separate basis for termination." *Riehl*, 152 Wn.2d at 152 (citing *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1139-40 (9th Cir.2001)); *see also Gambini v. Total Renal Care, Inc.*, 486 F.3d 1087, 1093 (9th Cir. 2007) (interpreting

Washington law and holding it is reversible error to fail to instruct the jury on this statement from *Riehl*). In *Humphrey*, similar to Santos's situation, an employee had an obsessive-compulsive disorder that caused attendance problems, for which she was fired. 239 F.3d at 1140. The Ninth Circuit held a reasonable juror could find that her termination was thus because of her disability: "The link between the disability and termination is particularly strong where it is the employer's failure to reasonably accommodate a known disability that leads to discharge for performance inadequacies resulting from that disability." *Id.* As it is here. Therefore, a genuine issue of material fact exists on that ground alone.

Additionally, under the WLAD, comparator evidence[3] may be sufficient to create a genuine issue of material fact. *Johnson*, 80 Wn. App. at 229. The OIC did not produce any evidence that it had previously terminated an employee for personal computer use. (*See* CP 318-29.) To the contrary, several presumably non-disabled employees received less severe penalties—fines ranging between $450 and $900—for personal use such as writing personal email, thousands of instant messages, visiting websites

[3]Evidence that other employees were not discharged despite acts "of comparable seriousness ... is adequate to plead an inferential case that the employer's reliance on his discharged employee's misconduct as grounds for terminating him was merely a pretext." *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 n.11, 96 S. Ct. 2574, 49 L. Ed. 2d 493 (1976), *cited with approval in Johnson*, 80 Wn. App. at 228.

hundreds of time, and being found to have a "significant amount" of total internet activity attributable to personal use, not business. (*Id.*) Further, at least one of these employees was subjected to progressive discipline, with two warnings before receiving a fine. (CP 326.) And progressive discipline is the OIC practice for employee discipline under its internet-use policy—Watson and McNaughton both admitted as much at their depositions. (CP 524:12–524:23, 610:7–610:11.) But Santos did not receive a warning for his internet use, only a termination. Given this differing treatment, a reasonable inference arises that regardless of whether *some* discipline was warranted, Santos's disability was a "substantial factor" driving the discharge.

The content of Santos's email and websites might have differed from these other employees. But McNaughton, Odiorne, and Watson agreed at their depositions that the OIC's internet-use policy does not rank one type of non-business internet content worse than another; in fact, Watson claimed that, when he disciplined Santos, "the deciding factor was the amount of activity," not the content. (CP 523:4–523:20, 529:9–529:24, 535:5–535:16.) When pressed, Watson could not cite any objective standard governing his disciplinary actions under the OIC's personal-use policies. He used only his "judgment." (CP 609–10.) *See Weldon v. Kraft, Inc.*, 896 F.2d 793, 798 (3d Cir. 1990) ("Where termination decisions rely on

subjective evaluations, careful analysis of possible impermissible motivations is warranted because such evaluations are particularly susceptible of abuse and more likely to mask pretext." (citation and quotation omitted)). Therefore, whether Santos and these other employees are similarly situated is a question for the jury. *See Johnson*, 80 Wn. App. at 230 ("Turning summary judgment on such narrow questions as the distinction between the behavior of the comparator and [the employee] defeats the fundamental concept of allowing discrimination claims to be decided on the merits.").

This comparator evidence alone is enough to create a triable issue of fact. But other evidence would also support a juror's reasonable inference that, notwithstanding Watson's non-discriminatory reasons for terminating Santos, a substantial factor was his mental disability. On this view, Watson grew tired of Santos's disability and yearned to rid himself of this "problem." But Santos never gave Watson the chance because his job performance was so strong. There was nothing Watson could hang his hat on—until Santos furnished him a reason. It might have been a trap. Just three days after the OIC agreed to install an internet filter on Santos's work laptop, the OIC turned off the internet filter on its network and gained an unblocked view of what Santos's unfiltered internet use would

be. Or maybe it really was a coincidence that the OIC turned off the filter and discovered Santos's use. Either way, it is reasonable to infer that Watson's decision had multiple causes, and one of them was Santos's disability. *See Johnson*, 80 Wn. App. at 229 ("Where the evidence creates "reasonable but competing inferences of both discrimination and nondiscrimination," a factual question for the jury exists."). Based on the forgoing evidence, Santos's disability-discrimination claim should be remanded for a jury trial.

II. THE CLAIMS OF RACIAL AND NATIONAL-ORIGIN DISCRIMINATION SHOULD BE SET FOR TRIAL

An employer may not "discharge or bar any person from employment because of ... race ... [or] national origin." RCW 49.60.180(2). For a jury to find such discrimination, only two elements must be proven at trial: (1) the employer discharged the employee, and (2) race or national origin was a "substantial factor" in the employer's decision. 6A Washington Practice: Washington Pattern Jury Instructions—Civil WPI 330.01. Because the causation standard for claims under RCW 49.60.180(2) derives from *Mackay*, an employee does not have to establish that race or national origin was the "determining factor" for the discharge. *Mackay*, 127 Wn.2d at 311–12. Rather, "a plaintiff must prove that an attribute listed in RCW

49.60.180(2) was a 'substantial factor' in an employer's adverse employment decision." *Mackay*, 127 Wn.2d. at 310. Whether this level of discriminatory intent existed is "a pure question of fact." *Johnson*, 80 Wn. App. at 230 (internal quotations and citations omitted). Regardless of whether Santos's claim is evaluated using the "pretext"-based framework of shifting burdens of production, or a straight-forward "substantial factor" analysis, a reasonable jury may infer that the OIC discharged Santos because of his race or national origin.

As with other discrimination claims under the WLAD, comparator evidence can be enough to find a genuine issue of material fact. *Johnson*, 80 Wn. App. at 229 (internal quotations and citations omitted). The same comparator evidence that supports Santos's disability-discrimination claim would allow a reasonable juror to decide that Santos's race or national origin was a substantial factor in his termination. Another piece of comparator evidence is the OIC's reclassification of another, likely non-Filipino, actuary associate in 2002, despite Santos performing at the same level. (CP 342 ¶ 10.)

Piled onto this comparator evidence are several other circumstances: Watson's plain dislike for Santos from the moment he laid eyes on him; Santos's demotion within the first few months of starting his position;

McNaughton's statement that Santos had to be white to be reclassified; Watson's permission for a white OIC employee to travel to Orlando for training but his refusal for Santos to do the same; the OIC's failure to reclassify Santos for three and a half more years despite Santos's repeated requests, his positive job-performance evaluations, and McNaughton's admission that Santos's job duties were commensurate with the higher position; the OIC's disregard for its commitment in the EEOC mediation process to reclassify Santos; and the suspicious OIC response to Santos's request for an internet filter. Santos's race-discrimination claim should be remanded for a jury trial.

III. A JURY COULD REASONABLY FIND RETALIATION

The WLAD prohibits retaliation: "It is an unfair practice for any employer ... to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge." RCW 49.60.210(1). The statute contains three elements that an employee proves a trial to show retaliation: (1) a "statutorily protected activity," (2) "an adverse employment action," and (3) "a causal link" between the protected activity and the adverse employment action. *Delahunty v. Cahoon*, 66 Wn. App. 829, 839, 832 P.2d 1378 (1992); *see also* 6A Washington Practice: Washington Pattern Jury In-

structions—Civil WPI 330.05. Based on the evidence produced for the trial court's review, summary judgment on Santos's retaliatory discharge claim was not appropriate.

A. Some of Santos's statutorily protected activity is not in genuine despite, and a reasonable juror could find even more than what the OIC has admitted

The OIC agreed below that Santos engaged in protected activity when he "filed a charge," RCW 40.60.210(1), namely the complaints with the EEOC on August 12, 2005 and September 1, 2006.

The record discloses several other instances of Santos engaging in protected activity under the "opposition clause" of RCW 49.60.210(1). To show his activity "opposed any practices forbidden" by the WLAD, RCW 49.60.210(1), an employee does not have to show the opposed practices were "actually" unlawful. *Estevez v. Faculty Club of Univ. of Wash.*, 129 Wn. App. 774, 798, 120 P.3d 579 (2005) (citation omitted). Rather, the test is whether an employee opposes employment practices with an objectively reasonable belief the practices were unlawfully discriminatory. *See, e.g.*, *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn. App. 611, 619, 60 P.3d 106 (2002) (stating the employee "need only demonstrate that her belief was reasonable under the circumstances"). This is a question of fact for the jury to decide. *See Kahn v. Salerno*, 90 Wn. App. 110, 130, 951 P.2d 321, 332 (1998).

The employee may meet this test to the jury's satisfaction simply by showing the opposed conduct was "arguably" unlawful. *Id.* (citation omitted).

Here, a reasonable juror could find Santos engaged in opposition activity by insisting on the agreed-upon remedies for the OIC's discriminatory failure to promote Santos. Also, after Santos was placed on home assignment but before he was terminated, he wrote an email on August 5, 2006 to the HR manager implying he was considering a lawsuit for the OIC's failure to reasonably accommodate his request for a filter: "Any jury will see the OIC does not have the ability to act in good faith." (CP 39 ¶ 16.)

Additionally, a reasonable juror could decide that Santos engaged in a protected activity when he requested a reasonable accommodation. Washington courts have not yet decided whether a request for a reasonable accommodation is a statutorily protected activity, but federal courts have held it is under the federal analogue to the WLAD. *E.g., Coons v. Secretary of U.S. Dep't of Treasury*, 383 F.3d 879, 887 (9th Cir. 2004); *Soileau v. Guilford of Maine*, 105 F.3d 12, 16 (1st Cir. 1997). This Court should follow the federal cases and extend the WLAD's anti-retaliation protections to employees who request a reasonable accommodation.

For the employee to show the reasonable-accommodation request is a protected activity, the appropriate standard must be whether the employee

"had a reasonable, good faith belief that she was entitled to request the reasonable accommodation she requested." *Williams v. Philadelphia Housing Authority Police Dep't*, 380 F.3d 751, 759 n.2 (3d Cir. 2004) (citation omitted). Similarly to the test under the opposition clause, the employee "need not show that she suffers from an actual disability." *Selenke v. Med. Imaging of Colo.*, 248 F.3d 1249, 1264 (10th Cir. 2001). A requirement of proving actual disability would embolden bad employers and chill reasonable employee requests for accommodation, because employees would fear retaliation and be left without protection if they mistakenly, but in good faith, believed the law entitled them to an accommodation. Thus, it must be enough for the employee's belief to be objectively reasonable. This would be a question of fact for the jury. *See Shellenberger v. Summit Bancorp, Inc.*, 318 F.3d 183, 191 (3d Cir. 2003).

The record indicates that a jury should decide whether Santos's requests for reasonable accommodations were statutorily protected activities. Acting on the orders of a medical doctor, Santos asked for three leaves of absence—first in February 2004, then in 2005, and finally in September 2006. *See Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 645, 9 P.3d 787 (2000) (deciding that whether a medical leave of absence may constitute a reasonable accommodation is a question of fact). When Santos returned

from his second leave of absence, he requested to telecommute and asked for an internet filter; these requests also were supported by his psychiatrist's orders. Therefore, it is a genuine issue for trial whether Santos believed reasonably and in good faith that he was entitled to these accommodations. In fact, emails from OIC officials show that the OIC itself believed that Santos suffered from an *actual* disability and should be granted some form of accommodation.

B. Termination is always an adverse employment action

As for the second element of a retaliation claim, termination is an adverse employment action. *Estevez*, 129 Wn. App. at 798. Because Santos was fired, this element would be automatic for a jury.

C. A reasonable juror could decide that Santos's protected activity was a substantial factor in his termination, even if the OIC was motivated by another reason as well

For "situations involving discriminatory or retaliatory discharge," our Supreme Court designed a causation standard accounting for the reality that "both legitimate and illegitimate motives often lurk behind those decisions." *Allison*, 118 Wn.2d at 96. Thus, a jury may find for the employee on the third element—a causal connection—where the evidence shows only that the employee's protected activity was a "substantial factor motivating the adverse employment decision." *Id.* This "substantial factor"

standard finds its origins in tort cases where there are *multiple* causes of harm. *See id.* at 93–94. So it is easier to prove than "but for" causation. *Id.* at 86. On summary judgment, the employee may show retaliatory intent either through a bare "substantial factor" analysis or through the burden-shifting framework of pretext. *See Wilmot v. Kaiser Aluminum & Chemical Corp.*, 118 Wn.2d 46, 73, 821 P.2d 18 (1991).

Here, the comparator evidence discussed above likewise supports a reasonable inference that Santos's protected activities were a substantial factor motivating his discharge. Additional circumstantial evidence includes Santos's job performance. In the three evaluations he received before filing his first EEOC charge, he received positive remarks. Plus, Santos's termination came only four months after he was reclassified under the settlement from the EEOC meditation, just ten weeks after Santos asked for an internet filter as a reasonable accommodation, and merely eight weeks after Santos implicitly threatened to sue for the OIC's lack of "good faith" in installing the filter. Finally, the computer forensic report sat on Watson's desk for nearly a month until September 13, 2006, when, suddenly, one day after receiving a copy of Santos's second EEOC complaint, Watson writes Santos a letter threatening to fire him and setting a pre-disciplinary hearing date. All of these circumstances would support a

jury finding of retaliatory motive. *See Estevez.*, 129 Wn. App. at 799 ("Proximity in time between the discharge and the protected activity, as well as satisfactory work performance and evaluations prior to the discharge, are both factors that suggest retaliatory motivation.").

Perhaps a jury could find retaliation was not *the* reason for Santos's termination. But for a retaliatory motive to be a "substantial factor," it need not be the employer's "solve motivation" or even the "principal reason" for terminating the employee. *Burchfiel v. Boeing Corp.*, 149 Wn. App. 468, 482, 205 P.3d 145 (2009); *Renz*, 114 Wn. App. at 621. Nor does it have to be the "determining factor." *Allison*, 118 Wn.2d at 95–96; Committee Comment, 6A Washington Practice: Washington Pattern Jury Instructions—Civil WPI 330.05. The summary judgment on Santos's retaliation claim should therefore be reversed.

IV. A TRIAL IS WARRANTED ON THE CLAIM OF NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

The elements of a claim of negligent infliction of emotional distress are "duty, breach of the standard of care, proximate cause, and damage," as well as "objective symptomatology." *Strong v. Terrell*, 147 Wn. App. 376, 387, 195 P.3d 977 (2008) (citations omitted). This final element means that the employee's "emotional distress is accompanied by objective symptoms and the emotional distress must be susceptible to medical diagnosis

and proved through medical evidence." *Id.* at 388 (citation omitted). Employers have this duty to employees in the workplace, but not with respect to disciplinary acts or an employer's efforts to resolve disputes between individual employees. *Chea v. Men's Wearhouse, Inc.*, 85 Wn. App. 405, 412, 932 P.2d 1261 (1997); *Bishop v. State*, 77 Wn. App. 228, 235, 889 P.2d 959 (1995).

Here, enough evidence appears in the record for a reasonable jury to find each of the requisite elements. *See Strong*, 147 Wn. App. at 387 ("Each of these issues is a question of fact for the jury to resolve."). Based on Santos's leaves of absence and the communications from him and Dr. Javel about his medical diagnoses, the OIC knew about Santos's mental fragility. Yet the OIC dragged its feet for four months after the EEOC mediation prodded the OIC to agree to reclassify Santos. (CP 351–52 ¶¶ 39–43, 398-415.) As early as December 23, 2005, Santos complained to McNaughton, Odiorne, and the HR manager that the delay was worsening his emotional state. (CP 400.) Still, the reclassification did not come until four months later. (CP 353 ¶ 44.) Once Santos returned to work, the OIC did not install the internet promptly, despite knowing that Santos needed it to deal with his depression and anxiety. In short, genuine issues of material fact remain on each of the elements of this claim.

V. EVIDENCE OF THE INTERNET CONTENT SHOULD HAVE BEEN STRICKEN

The trial court's denial of a motion to strike evidence presented with a motion for summary judgment is reviewed de novo. *See Momah v. Bharti*, 144 Wn. App. 731, 749, 182 P.3d 455 (2008) ("Ordinarily, evidentiary rulings are reviewed for abuse of discretion. However, '[t]he de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion.'" (quoting *Folsom v. Burger King*, 135 Wb.2d 658, 663, 958 P.2d 301 (1998)). Under ER 403, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." In an act requiring personal courage, Santos has freely shared information about the sexual abuse that he endured as a child and the consequential effects on his mental health. Nevertheless, none of his sexual history should have been considered by the trial court, nor should the adult-oriented content of the websites he visited or the messages he sent have been considered. In their depositions, as noted above, McNaughton, Odiorne, and Watson acknowledged that the relevant question when disciplining under the OIC's internet-use policies was the duration and frequency of the use, not the content. Therefore, evidence of the content in this case is meant to appeal to the emotions of the jury—or the

court—and should have been stricken. *See Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 671, 230 P.3d 583 (2010) (When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists."). The trial court's order should be reversed.

CONCLUSION

For the forgoing reasons, this case should be remanded for trial on Santos's claims of discrimination, retaliation, and negligent infliction of emotional distress. Genuine issues of material fact remain.

DATED this 2nd Day of March 2012.

Respectfully submitted,

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IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ALEXIS S. SANTOS, a married individual,

Appellant,

v.

THE WASHINGTON STATE OFFICE OF THE INSURANCE COMMISSIONER, a government entity, and THE STATE OF WASHINGTON, a government entity,

Respondents.

CERTIFICATE OF SERVICE

On March 2, 2012, the same day as I filed the original and a copy with the Clerk of Division II of the Court of Appeals, I caused a copy of this *Certificate of Service* and the *Appellant's Opening Brief* to be served on Mark Jobson, counsel for the respondents, by delivering the copy to ABC Legal messengers, for service on that same day on Mr. Jobson at his office at Torts Division, Washington State Attorney General's Office, 7141 Clearwater Drive SW, Olympia WA 98504-0126. I also emailed a copy of each to Mr. Jobson at markj@atg.wa.gov and to his assistant at torolyef@atg.wa.gov.

I certify under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED this 2nd day of March 2012.

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